

# The Catalan Self-Determination Referendum Draft Bill: A New Form of Transitional Constitutional Regime

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Last July 3rd, several representatives of the three secessionist parties in Catalonia – PDEcat, ERC and CUP – presented the draft of the so-called Self-Determination Referendum Act, an ad-hoc statute that is meant to regulate the process of a referendum on the secession of Catalonia. In the morning, the draft was presented in the Catalan Parliament. It was basically an informal presentation for the press, with no official value, in which the other parties refused to be present. In the afternoon, this informal draft was presented to the wider public by several members of the Catalan Government in such an unusual setting as a theater – the National Theater of Catalonia –, in an event with a TV show format. The *mise-en-scène* could not be more theatrical. Technically, this draft is not a bill yet, since it has not been introduced into the Catalan legislature. Probably it will be this August, in the middle of the vacation period in Spain. But this draft bill is very interesting from a constitutional point of view, and we should all pay some attention to it. Let me explain why.

The Catalan Self-Determination Referendum Act, as I said, is an ad-hoc piece of legislation that regulates only one specific referendum process: the referendum on the secession of Catalonia from Spain. It is a one-shot legislation. It establishes who will vote, how the process will be conducted, how the campaign should proceed, and how should it be reflected by the media. It creates a specific Electoral Commission, and regulates who and how will be able to submit complaints to it. It determines the question to be asked in the referendum, and establishes the conditions in which it will be considered approved. And it even fixes the date in which such referendum is supposed to be held – October the 1st –, and prefigures what will be the institutional consequences of a majoritarian yes- or no-vote. None of this is truly internationally remarkable. What is exceptional, especially from a constitutional point of view, is that this piece of legislation will create a transitional constitutional regime, which constitutes of course a constitutional *coup d'état* from the standing point of the Spanish constitutional legality, and a regime that is scheduled to die automatically in October the 3rd. If this draft bill is finally approved by the Catalan parliament, and if the Spanish constitutional court does not immediately strike it down, which is almost impossible not to happen, it will constitute the fastest constitutional regime ever.

But let me start with the boring stuff. And, first, here it is some background. It is well known that the Rajoy Administration in Spain does not authorize Catalans to vote in a secession referendum. The secessionist ranks in Catalonia have been pressing for years in order to be able to have a vote on this issue. It is controversial, from a technical point of view, whether the Spanish constitution would allow for such a referendum. For those who claim it would, the key issue is that a primer minister's authorization is required. But even if such referendum is not compatible with the current constitution, it is obvious that the constitution might be amended to make room for it. And this, again, depends on the agreement of *Partido Popular* (jointly with other majoritarian political forces). Thus, in any case, the refusal by Rajoy and *Partido Popular* of allowing the Catalans to vote on secession makes it legally impossible to hold such referendum. This is important in order to understand that the secessionist parties in Catalonia, fully determined to hold the referendum anyway, have drafted this bill with the manifested intention to break or disobey the – Spanish – law. There is no discussion, then, about whether such bill is constitutional or not. It is obviously not. And no one among the secessionist is naïf enough to believe that it will not be challenged before, and struck down by, the Constitutional Court in a few days after his parliamentary approval – which we can also take for granted, since the secessionist parties have a majority of seats in the Catalan parliament. The announced secessionist strategy will consist in continuing to operate under the basis of this new law, and hold the referendum anyway, thus disobeying what the Spanish Constitutional Court may have said, and being aware that this will condemn the referendum to a framework of illegality. As well known as all of this is for everyone in Catalonia and Spain, the draft bill faces several significant difficulties precisely derived from the fact that it is supposed to operate in such framework of illegality.

One of these difficulties is that the Catalan government does not possess any electoral register or roll, which is in possession of the Spanish electoral authorities. The Self-Determination Referendum draft bill establishes that the same people who are allowed to vote in the elections to the Catalan parliament will be able to vote in the referendum. But, despite the rumors that they might have had illegal access to the register, the Catalan government does not have any means to know who exactly are those. Thus, de facto, anyone interested in voting will be able to attend to the polling station, declare that she is allowed to vote in the Catalan legislative elections, and cast her ballot in the referendum.

The draft bill establishes the question for the referendum: *Do you want Catalonia to become an independent state with the form of a republic?* And only two possible answers will be allowed: *yes* or *no*. The bill even establishes how the ballot should look like. But the two more controversial issues are these: it does neither establish a turnout validity threshold, nor an approval threshold. It is true that other secession referendums have not established thresholds either. But it is important to understand that this one will be held in a framework of illegality. If only secessionists finally go to vote, as most in Catalonia expect, it well might happen that the referendum gets a 95% of approval from a 40% turnout. And, according to the bill, the Catalan parliament will have to declare the independence of Catalonia within 48 hours. In effect, the draft bill prefigures what institutional consequences will follow from its results. If *yes* wins, the parliament will be obliged to immediately declare independence. If it's *no* who wins, it will be obliged to call for ordinary elections. The draft is very clear to say that the secession referendum will be absolutely binding, to the point of prefiguring such legal obligations for the parliament.

Another controversial aspect of the draft bill concerns the electoral guarantees of the referendum. Given that only secessionists are determined to hold the referendum in the framework of illegality, everything seems to indicate that this will be a referendum designed, organized, supervised, and whose ballots will be counted, by only one side in the debate. Even the five members of the Electoral Commission – the *Sindicatura Electoral de Catalunya* – will be appointed by the secessionist majority in the Catalan parliament, given that the anti-secessionist forces refuse to collaborate with the organization of an illegal referendum. And this fact might be of high importance, given that a referendum in a framework of illegality is expected to generate many doubts and complaints that only such *Sindicatura Electoral* will be able to handle and solve.

Finally, another controversial feature of the bill is that, as any other electoral or referendum regulation, it establishes the conditions in which those who will work in the polling stations will be selected and take care of the whole process. The draft bill, mirroring the general electoral procedures in Spain, says that the thousands of citizens who will be required to work in those polling stations will be appointed by lottery. They will have the legal obligation to attend to collaborate with the process. But such obligation will only exist according to such referendum act, which presumably will have been struck down by the constitutional court. What is more, any collaboration with the referendum process by those citizens, or by the Catalan civil servants asked to supervise and manage the process, will be considered illegal according to the Spanish constitutional law, as the Constitutional Court jurisprudence has recently established (for instance, in the judicial order 24/2017, of February 14th). It is interesting, at this respect, that Article 3.3 establishes legal immunity for the authorities who participate in the “preparation, celebration, and/or implementation of the referendum’s results”. Such immunity, however, will stop producing effects as soon as the act itself is struck down or suspended.

For all these reasons, this draft bill raises significant concerns regarding not only its legality, but also the guarantees and legitimacy for the secession referendum. In terms of its democratic legitimacy, it is important to mention an additional worry. The bill, as any other piece of legislation, will be presumably passed by the Catalan parliament with the support of the majority of its members. The three secessionist parties control 72 out of the 135 seats. But this majority falls short of the kind of supermajority that would be required to reform the *Catalan Estatut*, the sort of regional constitution from which all regional powers are derived. Thus, some might be concerned that a legislation as disruptive, and at the same time as fundamental as this one, which will necessarily involve a breakdown in the Catalan and Spanish legality, is passed by a lower majority, and therefore gather much less social consensus and support, than the one that was required to adopt and reform the *Estatut*. What is more, that majority in parliament actually represented 48% of the voters in the last election – which turned into a majority of seats only due to the overrepresentation of the rural areas. So such secessionist

block, which is the only one giving support to the referendum statute, is not even representative of a majority of voters in Catalonia. This brings me to my last point, and the most interesting aspect of this draft bill.

Under the surface of an ad-hoc specific referendum regulation, the draft bill includes two articles of obvious constitutional nature. Article 2 declares the sovereignty of Catalonia: “The Catalan people is a sovereign political subject, and, as such, it exercises its right to free and democratic choice, which is its political condition.” Article 3 develops this idea of sovereignty by declaring, in section 1, that “the Parliament of Catalonia acts as a representative of the Catalan people’s sovereignty”. And section 2 of the same Article 3 says that “this Act establishes an exceptional legal regime in order to regulate and guarantee the self-determination referendum in Catalonia. It hierarchically prevails over any norm that might be in conflict with it, for it regulates the exercise of an unalienable, fundamental right of the people of Catalonia.”

It is obvious that Articles 2 and 3 transcend the level of legislation and establish a constitutional regime. First, they proclaim the political sovereignty of a people. Second, they declare this legal provision to be a fundamental, supreme norm that prevails to any other, Catalan, Spanish, or even international. As a constitutional regime, though, it is exceptional in two senses. First, it is circumscribed to the organization of a secession referendum. In the Final Disposition 1, it explicitly acknowledges that the rest of the legal system of any order will continue to be applicable in Catalonia insofar as it does not contradict the present act. And second, because of the first, it is transitional, and it actually establishes the time constraints in which it will operate. The Final Disposition 2, in effect, this act’s provisions will stop being valid once the results of the referendum have been proclaimed”.

Thus, as soon as this draft bill is passed by the Catalan parliament in the following weeks, a transitional constitutional regime of a new form will have been enacted in Catalonia. This new constitutional regime will widely clash with the Spanish constitutional legality. And everything indicates that the Spanish Constitutional Court will react immediately by striking down this legislation, and probably indicting several members of the Catalan government. However, the Catalan authorities, under control of the secessionist parties, have announced that they will proceed in any case under such Catalan transitional constitutional regime. This will be the first constitutional *coup d’état* since the creation of the European Union. And will create a first-order constitutional problem in Europe. How should the Spanish government handle this situation? How should the EU authorities and the other European governments react to it? How should the citizens in Catalonia face this terrible institutional breakdown? Is it democratically legitimate to enact a disruptive, constitutional *coup d’état* with only 48% of popular support? These are very relevant political questions that we should all start to answer.

But, in parallel, this case also raises interesting questions from the point of view of constitutional law. When a referendum is meant to operate in a framework of constitutional illegality, as in the Catalan case, it seems to require some kind of transitional constitutional regime of this kind. How else it could proceed and do things that are constitutionally forbidden under the assumption that the results will be politically – and legally – valid? The Catalan secession referendum will certainly be not the first referendum – whether of secession or not – in breaking explicitly the legality of the system. How should constitutional law theory capture this kind of breakdowns? Under what conditions might they be held to be democratically legitimate? Can we learn something from the current scenario in Catalonia? All these also strike me to be very interesting questions, and constitutional lawyers should start offering responses.

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